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Kenneth L. Karst

*University of California, Los Angeles*

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# Citizenship, Law, and the American Nation

KENNETH L. KARST\*

Maybe it is true that the center will not hold. Yet, despite the title of her article in this issue of the *Journal*, Linda Bosniak does not predict an imminent devaluation of U.S. citizenship.<sup>1</sup> Rather, she offers a critical survey of a growing body of literature suggesting that national citizenship and national loyalties are in a state of decline, or arguing that what the world needs now is a pluralization of citizenship, with the nation only one among many attachments and with the very word "citizen" denationalized. To the extent that this literature represents factual claims or predictions, my own response is agnostic. Perhaps the process of dilution is already under way; voting percentages have been declining in the United States, and a distinct literature bemoans the erosion of our (non-governmental) civil society.<sup>2</sup> Those who feel threatened by "Balkanization,"<sup>3</sup> or who see the United States not as a nation-state but "a nation of nationalities,"<sup>4</sup> may have their perceptions validated.<sup>5</sup> In the century to come, the nation may, indeed, face a crisis in national identity.<sup>6</sup> It would not be the first time.

This Comment is not an exercise in counter-prediction. I leave it to observers in the twenty-first century to characterize what will have happened. Instead, this is a Comment on the normative branch of the literature of denationalized citizenship. Writers emphasizing the denationalized nature of citizenship express two overlapping preferences. First, they fancy a pluralized meaning for the term "citizenship," in which allegiance to the nation is but one among a variety of meanings. Second, they aspire to create and maintain multiple and diverse forms of "postnational" citizenship—global or local, public or private, or all at once. These writings, Professor Bosniak reminds us, are above all rhetorical; they are long on the morality of universal regard for

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\* David G. Price and Dallas P. Price Professor of Law, University of California, Los Angeles.

1. Linda S. Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

2. See, e.g., Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, AM. PROSPECT, Spring 1993, at 35.

3. See ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991).

4. Michael Walzer, *Comment*, in MULTICULTURALISM AND "THE POLITICS OF RECOGNITION:" AN ESSAY BY CHARLES TAYLOR 101 (Amy Guttmann ed., 1992).

5. I have expressed my doubts elsewhere. See Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141 (2000).

6. See Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 598 (1999).

persons, and short on identifying means for translating that universalist ethic into a political or social reality. Many of the writings appear in philosophical journals, where editors might think themselves churlish if they asked for blueprints. However, surely a law journal is an appropriate venue for a lawyer to draw attention to such institutional questions.

Possibly—just possibly—the idea of denationalized citizenship may have appeal for citizens of some countries where national citizenship is a formal status and little more. Here, though, I address U.S. readers. The remarks that follow highlight the centrality of law in defining the meanings of citizenship in today's America, and in protecting citizenship's substantive values of respect, responsibility, and participation. For readers in a hurry, I disclose my conclusion now: For Americans, it would be the gravest folly to act with the purpose of undermining the significance of national citizenship until they have a reasonable assurance that alternative mechanisms, global or local, will provide equivalent protections of individual liberty, equality, and democracy.

The idea of citizenship carries many potential meanings, which Professor Bosniak ably sorts into categories: citizenship as status, citizenship as rights, and citizenship as identity or solidarity.<sup>7</sup> This division is a useful analytical strategy given the global reach of her discussion. But in late twentieth century U.S. experience, these “strands” of citizenship, as she calls them, gained strength as they became tightly entwined. National law played a crucial role in that transformation. Consider the formal status of citizenship, which seemed to Alexander Bickel a trifling matter—“at best a simple idea for a simple government.”<sup>8</sup> But to an African-American living under Jim Crow, or to many a resident alien today, the status was and is a prize to strive for.<sup>9</sup> Some readers of these words will be old enough to remember the newspaper photographs of African-American citizens, newly enfranchised by the Voting Rights Act of 1965, as they stood in line to vote, many of the men in coats and ties. The formal status of citizenship can seem trifling only when you are able to take it for granted. Voting, of course, is not primarily the power to affect the choices of public officeholders and public policies;<sup>10</sup> it is the preeminent

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7. She does so in Part I, pages 455-88, of this issue, constituting more than half of the article.

8. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975).

9. In 1977, I remarked summarily that the Fourteenth Amendment's equal protection clause was entirely capable of extending much of the larger principle of equal citizenship to aliens. Kenneth L. Karst, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 44-45 (1977). Professor Bosniak gave the subject the thorough treatment it deserved in an insightful article published six years ago. See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

10. Indeed, a single citizen's vote almost never will decide an election. See ANTHONY DOWNS,

expression of citizenship, of identity as an equal member of the national community.

More broadly, it was national law that braided the strands of citizenship—formal legal status, equal rights, and belonging—into the principle of equal citizenship. I refer not only to the Supreme Court's line of egalitarian constitutional decisions commencing with *Shelley v. Kraemer*<sup>11</sup> and *Brown v. Board of Education*,<sup>12</sup> but also to a series of acts of Congress beginning with the Civil Rights Act of 1964. My insistence on the singularity of equal citizenship in this country is not a quibble about taxonomy; separating the abstract idea of citizenship into various strands is a sensible heuristic practice for a global survey. What I seek to emphasize here is a substantive feature of American citizenship in our time: it blends equality of status with a sense of belonging, with the entire process founded upon law. Today, the equal citizenship principle, embodied in the U.S. Constitution and further effectuated by legislation, is indispensable to the protection of Americans' rights to equality, liberty, and democracy. In turn, this state of the law is to some degree self-perpetuating, for it is now widely seen as an organic part of the meaning of American citizenship—indeed, it is embedded in the meaning of the nation itself.<sup>13</sup>

Let no U.S. citizen feel complacent about these developments. The principle of equal citizenship was largely honored in the breach for the first century-and-a-half of our national history,<sup>14</sup> and even today, after the advances of the last five decades, the principle remains unfulfilled. For those who would remedy this deficiency, two major tasks lie ahead. First, groups defined by race, ethnicity, religion, sex, sexual orientation, and other "primordial" identities still face a variety of forms of exclusion from full participation in public life. The inclination to maintain these exclusions is especially virulent in some local communities, and especially likely to be carried out there. Second, because full participation as a citizen rests on a material base,<sup>15</sup> poverty excludes large

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AN ECONOMIC THEORY OF DEMOCRACY 151-54 (1957).

11. 334 U.S. 1 (1948).

12. 347 U.S. 483 (1954).

13. On the centrality of the American civic culture—a cluster of values emphasizing individualism, equality, nationalism, and tolerance of diversity—in defining the nation and what it means to be an American, see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 361-77 (1986).

14. The modern definitive work on this theme is ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN AMERICAN HISTORY* (1997).

15. This assertion, of course, is an echo of THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950). For an up to date analysis, see Joel F. Handler, *The Moral*

numbers of U.S. citizens from full membership in the national community, and the gap between the “haves” and the “have-nots” is widening. Historically, the most effective responses to both types of exclusion have taken the form of national law.

Much of the history of the modern recognition of equal citizenship in the United States can be told as a story about the uses of national law in taming local oppression, with Jim Crow as the most egregious twentieth century example. The communities that excluded African-Americans from participation were local communities, but the legal claims to inclusion were founded on a national ideal of citizenship. The eradication of the worst features of Jim Crow was a cooperative effort of Congress and the federal judiciary in making and enforcing national law. In the wake of these developments, most states and many cities have adopted legislation forbidding discrimination on racial and other grounds. Yet, some forms of local legislation and private behavior continue to promote the exclusion of groups from equal citizenship. In at least some such cases, the Supreme Court has decisively held the local laws invalid. A prominent recent decision is *Romer v. Evans*,<sup>16</sup> which struck down an amendment to the Colorado state constitution that purported to bar state agencies and local governments from protecting lesbians and gay men against private discrimination.

The effective exclusion of poor U.S. citizens from full citizenship is not the direct result of either local or national governmental action, nor is it the result of concerted private action aimed at heaping disadvantages on the poor. The gulf between the comfortable and the poor is, in many respects, the product of myriad decisions in domestic and foreign market transactions. If a “safety net” is to be provided for poor Americans, the only practical source will be a legislative program at the national level. State and local governments are, of course, empowered to adopt social welfare legislation, but the prospects for redistribution at these levels are dim. Legislators regularly express the fear that local welfare generosity will have a “magnet” effect, inducing poor people from other localities to move for the purpose of collecting higher welfare benefits.<sup>17</sup> In any case, welfare is out of vogue in U.S. politics. If any governmental effort is made to bring the poor into full membership, it will likely

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Construction of Social Citizenship and the Crisis of the Welfare State (1999) (unpublished manuscript) (on file with author).

16. 517 U.S. 620 (1996).

17. Contrary to this widely-held belief, this “welfare magnet” effect has not been demonstrated empirically; the statement in the text refers to beliefs expressed by legislators.

be a program to provide the opportunity for employment at a decent wage, and with the security of health and pension benefits to all who seek it. By any reckoning, such a program will require national legislation, even if state governments participate in it. The historical precedent for such a program would be the New Deal, and the most persuasive argument for it would take the shape of an appeal based on our common citizenship: These are citizens of the United States, and it is intolerable to let them live this way.

The globalization of the labor market presents a huge obstacle to the success of a U.S. full-employment program. Further, even if means could be found to minimize that obstacle,<sup>18</sup> for the immediate future it seems fanciful to imagine that Congress will enact any such program, let alone a program sufficiently far-reaching to bring large numbers of the poor into the community of equal citizens. The poor, after all, are politically inert. Yet, if anything serious is to be done about the practical exclusion of the poor from citizenship, it will be done by the national government. Similarly, if anything serious is to be done about local exclusions of locally disfavored groups from citizenship, it will be done through national law. If either of these forms of national effort are to come to pass, they will be undertaken in the name of the responsibilities of American citizens to each other.

The principle of equal citizenship, largely defined and effectuated by law, has recently done a lot of heavy lifting in the cause of liberty, equality, and democracy in the United States. Without it, we should be very much the poorer, both in substance and in spirit. All this is to say that anyone who proposes to downplay U.S. national citizenship and its legal underpinnings ought to be prepared to do more than merely instruct U.S. citizens in the ethic of universal regard. If the proponents of postnational citizenship are to persuade U.S. citizens to go along with their project, they will have to offer an institutional framework that serves to protect the substantive values of citizenship. It is not enough to point out the dangers of rabid nationalism (which I, for one, concede), or the danger that tying rights to the formal status of citizenship may leave aliens in the United States improperly excluded (I said before that aliens are constitutionally entitled to most of the guarantees of equal citizenship,<sup>19</sup> and the Supreme Court has accepted this idea to a modest degree).<sup>20</sup> In short, what the proponents of postnational citizenship need to

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18. For some reflections on this possibility, and citations to scholars who are truly competent to think about it, see Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORN. L. REV. 523, 559-62 (1997).

19. See *supra* note 9.

20. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Bernal v. Fainter*, 467 U.S. 216 (1984). The

offer, if they hope to convince significant numbers of U.S. citizens beyond the readers of academic journals, is law.

The international law of human rights may, in a future not yet visible, become an acceptable alternative to judicial enforcement of the Bill of Rights and the Fourteenth Amendment. Something along these lines has happened in the United Kingdom, where accession to the European Convention on Human Rights and the Treaty of Rome has produced important substantive changes in domestic law, enforced by British courts.<sup>21</sup> However, as Professor Bosniak notes, Europe is a special case. In most of the world, if human rights are not enforced by national law, they are not enforced at all. This is not to deny that the international law of human rights has long-term persuasive power, but it is to say that typically a "citizen of the world" (in contrast to a citizen of a Member State in the European Community) has only the most tenuous guarantee that his or her human rights will find legal protection outside some country's national law.

When we turn to the material foundations for real citizenship, the prospects seem remote for a citizenship that truly extends over the globe. For example, a colleague recently told me that about one-half the world's population has never used a telephone. Even if that factoid should be an exaggeration, it hints at the magnitude of difficulty attending any effort to assure a material base for global citizenship. Existing international organizations are doing heroic work in areas such as famine relief and disaster relief, with resources that are already overextended; when the issue is jobs and incomes, these organizations will be slender reeds on which the world's poor can lean. If the World Trade Organization should ever show a genuine interest in the problems of the poor, then I shall believe in fairies and clap my hands.

If, as Professor Bosniak remarks, the notion of denationalized citizenship remains largely rhetorical and aspirational, it is fair to ask the proponents: To what do you aspire? My claim here is that, in the United States today, citizenship is inextricable from a complex legal framework that includes a widely accepted body of substantive law, strong law-making institutions, and law-enforcing institutions capable of performing their tasks. Who will make law when citizenship is denationalized and scattered among public and private agencies around the globe? What subjects will this law address? Who will

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Court has not carried this development nearly so far as I (or Professor Bosniak) might wish.

21. I predicted this result in *Judicial Review and the Channel Tunnel*, which was written before there was a Channel Tunnel. Kenneth L. Karst, *Judicial Review and the Channel Tunnel*, 53 S. CAL. L. REV. 447 (1980).

appoint the lawmakers? Who will be charged with enforcing the law, and will they have effective power to do so? If a postnational citizen is unhappy when Serbs kill Kosovars, or Kosovars kill Serbs, to which global official should she send a letter? Will there be an election—or twenty elections—in which she has a vote? Why on earth should she bother? Most vitally of all, when the global institution itself acts against a postnational citizen, who will protect the citizen's rights to liberty, equality, and democracy? Why should any American see an assortment of dispersed and relatively weak postnational citizenships as preferable to a relatively strong national citizenship founded on law?



